

Supreme Court, U. S.
FILED

NOV 28 1978

MICHAEL RODAK, JR., CLERK

**In The
Supreme Court of the United States**

October Term, 1978

— o —
No. 78-895
— o —

EVERETT SATTERFIELD,

Appellant,

vs.

SUNNY DAY RESOURCES, INC.,

Appellee.

— o —
**ON APPEAL FROM THE SUPREME COURT
OF WYOMING**
— o —

JURISDICTIONAL STATEMENT
— o —

**GEORGE CLARKE
P. O. Box 7
Lusk, Wyoming**

Attorney for Appellant

TABLE OF CONTENTS

	Pages
Opinion Below	2
Grounds of Jurisdiction	2
Questions Presented	5
Statement of the Case	5
Federal Questions Are Substantial	10
Conclusion	20
Appendix A	App. 1
Appendix B	App. 11

TABLE OF AUTHORITIES

CASES:

Abie State Bank v. Bryan, 282 U. S. 765, 75 L. Ed. 690, 51 S. Ct. 252 (1931)	2, 17
Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 80 L. Ed. 688, 56 S. Ct. 466 (1936)	3, 10
DeClark v. Bell, 10 Wyo. 1, 65 P. 852, 853 (1901)	6
Dixon v. Duffy, 344 U. S. 143, 97 L. Ed. 153, 73 S. Ct. 193 (1952)	3
Hammerstein v. Superior Court of California, 304 U. S. 622, 95 L. Ed. 586 (1951)	3
Herb v. Pitcairn, 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459 (1945)	3, 16
Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 86 L. Ed. 1090, 62 S. Ct. 857 (1942)	3, 10

TABLE OF CONTENTS—Continued

	Pages
Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920, 60 S. Ct. 676 (1940)	3
New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. Ed. 184, 49 S. Ct. 61 (1928)	3
School District Number 14, Fremont County v. School District Number 12, Fremont County, 48 Wyo. 511, 49 P. 682 (1935)	11
Southwestern Bell Teleph. Co. v. Oklahoma, 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528 (1938)	3, 10
Staub v. Baxley, 355 U. S. 313, 2 L. Ed. 2d 302, 78 S. Ct. 277 (1958)	3, 12, 18, 19
Ward v. Love County, 253 U. S. 17, 64 L. Ed. 751, 40 S. Ct. 419 (1920)	3, 17
Williams v. Kaiser, 323 U. S. 471, 89 L. Ed. 398, 65 S. Ct. 363 (1945)	3, 11, 19
Radio Station WOW, Inc. v. Johnson, 326 U. S. 120, 89 L. Ed. 2092 (1945)	3, 17
STATUTES:	
28 U. S. C. § 1257 (2)	2
Rule 37 (d), W. R. C. P.	3, 6, 9
Rule 37 (b) (2) (c), W. R. C. P.	3, 4
W. S. Section 1-13-101 (1977)	11

In The
Supreme Court of the United States

October Term, 1978

No.

EVERETT SATTERFIELD,

Appellant,

vs.

SUNNY DAY RESOURCES, INC.,

Appellee.

**ON APPEAL FROM THE SUPREME COURT
 OF WYOMING**

JURISDICTIONAL STATEMENT

The Appellant submits herewith his jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

The Supreme Court of the State of Wyoming, per Justice Raper, issued its opinion in *Satterfield v. Sunny Day Resources, Inc.*, No. 4875, April Term, A. D. 1978, on July 25th, 1978. The full text of that opinion, including the concurring opinion of Justice Thomas, is attached hereto as Appendix A.

— o — GROUNDS OF JURISDICTION

This is an appeal from an order dated August 28, 1978, of the Supreme Court of Wyoming denying appellant's Petition for Rehearing in *Satterfield v. Sunny Day Resources, Inc.*, No. 4875, April Term, A. D. 1978. This appeal is taken pursuant to United States Code Title 28, Section 1257 (2). Appellant filed his Notice of Appeal to the Supreme Court of the United States on November 24, 1978, in the Supreme Court of the State of Wyoming.

Appellant contends that the United States Supreme Court's jurisdiction of this matter may properly be based on United States Code Title 28, Section 1257 (2).

It is the Appellant's position that the following United States Supreme Court cases, either directly, by analogy, or as distinguished, will sustain this Court's jurisdiction over the appeal:

Abie State Bank v. Bryan, 282 U. S. 765, 75 L. Ed. 690, 51 S. Ct. 252 (1931).

Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 80 L. Ed. 688, 56 S. Ct. 466 (1936).

Dixon v. Duffy, 344 U. S. 143, 97 L. Ed. 153, 73 S. Ct. 193 (1952).

Hammerstein v. Superior Court of California, 304 U. S. 622, 95 L. Ed. 586 (1951).

Herb v. Pitcairn, 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459 (1945).

Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 86 L. Ed. 1090, 62 S. Ct. 857 (1942).

Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920, 60 S. Ct. 676 (1940).

New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. Ed. 184, 49 S. Ct. 61 (1928).

Southwestern Bell Telph. Co. v. Oklahoma, 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528 (1938).

Staub v. Baxley, 355 U. S. 313, 2 L. Ed. 2d 302, 78 S. Ct. 277 (1958).

Ward v. Love County, 253 U. S. 17, 64 L. Ed. 751, 40 S. Ct. 419 (1920).

Williams v. Kaiser, 323 U. S. 471, 89 L. Ed. 398, 65 S. Ct. 363 (1945).

Radio Station WOW, Inc. v. Johnson, 326 U. S. 120, 89 L. Ed. 2092 (1945).

Appellant contends that the validity of Rule 37 (d), *W. R. C. P.*, and also Rule 37 (b) (2) (C), *W. R. C. P.*, as applied to this case, are involved. (Statutes are referred to collectively as the Wyoming default statute.) The texts of these statutes provide as follows:

Rule 37 (d), *W. R. C. P.* "If a party or an officer, director, or managing agent of a party designated under Rule 330 (b) (6) or 31 (a) to testify on behalf of a

party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33 after proper service of the interrogatories or (3) to serve a written response to a request for inspection submitted under Rule 34 after proper service of the request the Court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this Rule. In lieu of any order or in addition thereto, the Court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26 (c)."

Rule 37 (b) (2) (C), *W. R. C. P.* "An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;"

QUESTION PRESENTED

Whether the application of a State Statute providing for the entering of a partial default judgment against a party who fails to appear at a deposition to a situation where the default order puts that party on notice that no evidence will be received at trial on a portion of the prima facie elements of conversion and where the trial court's decision is subsequently affirmed by the State Supreme Court solely on the basis that all elements of conversion were proved at trial, works a deprivation of procedural due process on that party.

STATEMENT OF THE CASE

Sunny Day Resources, Inc., a Nebraska Corporation, Plaintiff and Appellee below (hereinafter referred to as Appellee), filed its complaint in the District Court of the Sixth Judicial District within and for the County of Weston, State of Wyoming, on March 9th, 1976. Appellee's complaint allegedly made out a cause of action for conversion of certain oil and well drilling equipment against Everett Satterfield, stockholder, director and president of the plaintiff corporation, who was also Defendant and Appellant below. (Mr. Satterfield is hereinafter referred to as Appellant.)

On July 7th, 1976, the Appellee filed notice for the taking of the Appellant's deposition on August 2nd, 1976, and certified that a true copy thereof had been mailed to Appellant's attorney of record. Neither Appellant nor

his attorney received the notice and did not appear on such date. Subsequently, Appellee filed its Motion for Default Judgment as allowed by Rule 37 (d), *W.R.C.P.*, on August 6th, 1976. The District Court allowed Appellee's motion and on September 8th, 1976, ordered that:

"A judgment by default is awarded the plaintiff on the issue of whether or not the defendant unlawfully sold . . . (certain oil and well drilling equipment) . . . and converted the proceeds of this sale to his own personal use. The plaintiff will still be required to prove that it was the owner of the above described property at the time of conversion by the defendant, and the market value of the above described property at the time of conversion."

At trial, there was dispute as to which of the elements of conversion were still in issue. The trial court stated, "On the issue of ownership, there is no issue before the court on that particular matter." (Transcript of Trial, p. 22, lines 19, 20 and 21). It is relevant to the discussion here that under Wyoming law, the *prima facie* elements of conversion are as follows:

- (a) Legal title.
- (b) Actual title or right to immediate possession at the time of the alleged conversion.
- (c) A showing that the defendant has wrongfully exercised a distinct act of dominion over the property of plaintiff in denial of his right thereto.
- (d) Demand and refusal to return on the part of the defendant.
- (e) Valuation.

See, e. g., *DeClark v. Bell*, 10 Wyo. 1, 65 P. 852, 853 (1901).

The trial court entered judgment for the Appellee and against the Appellant on June 27, 1977. That judgment states, "The Court finds that the Plaintiff has established its ownership of the property that is the subject matter of this lawsuit, . . ."

On appeal to the Wyoming Supreme Court, Appellant raised as one issue an alleged abuse of discretion by the District Court in its order of partial default judgment on certain elements of conversion. The Supreme Court of Wyoming affirmed the District Court's decision solely on the basis that the Appellee had proven all necessary elements of conversion. The Court said:

"Here on appeal, defendant (appellant) asserts entry of such partial judgment by default was clearly an abuse of discretion. While at first glance the imposed sanction may appear somewhat harsh, it becomes apparent that it was without practical effect, since based on the evidence presented at what turned out to be a full trial, as we shall point out, all necessary elements of conversion were fully proven, including those elements purportedly resolved by the default judgment. The judgment of default thus being of no apparent prejudice to defendant, we decline to investigate the allegation of an abuse of discretion." *Satterfield v. Sunny Day Resources, Inc.*, No. 4875, Supreme Court of Wyoming, April Term, A. D. 1978, Page 2.

The thrust of the majority's opinion, and Appellant's criticism of it, is described quite clearly by the concurring opinion of Justice Thomas. That concurring opinion states:

"To the extent that the Court's opinion suggests that an abuse of discretion in granting a partial judgment as a sanction under these circumstances might be cured by trying the issues as to which the default

judgment was entered without setting aside the default judgment or notifying counsel that the issues would be tried, I cannot agree that this is or should be the law. Such an approach well could be as prejudicial to a party as an abuse of discretion in granting the partial default judgment initially. In the absence of any reason to believe that the partial default judgment was not exactly what the trial court said it was, a party quite likely would be unprepared to try the issue as to which the partial default judgment had been entered. Trying the issues in such a case would compound, not cure, the prejudice." *Satterfield v. Sunny Day Resources, Inc.*, No. 4875, Supreme Court of Wyoming, April term, A. D. 1978, Page 1, concurrence.

The federal question under consideration here, did not arise in this case until the Wyoming Supreme Court based its ruling on the premise that the Appellee had proven all essential elements of conversion in the trial court. It was at this point that the propriety of the notice of the issues that were to be litigated, as it was conveyed to the Appellant by operation of the Wyoming default statute, became subject to constitutional scrutiny.

The first instance in which the federal question was raised and presented was in Appellant's Petition for Rehearing. The main contentions from that petition as are relevant to this Court's jurisdiction are quoted as follows:

. . .

I. The Appellant's property was taken from him without due process of law.

. . .

II. The trial court permitted evidence to be presented by the Appellee regarding issues which had already been determined by the trial court (see Order of Court dated September 8, 1976) which was preju-

dicial to the Appellant's rights and prevented him from having a fair trial.

Appellant also filed a Brief in Support of Petition for Rehearing. The following language from that Brief is also relevant to this Court's jurisdiction by way of showing that the federal question was properly raised and presented to the Wyoming Supreme Court:

. . .

The Appellant maintains that it is both unreasonable and arbitrary for the Supreme Court to uphold the trial court solely on the basis that the Appellee proved all necessary elements of conversion when the Court Order of September 8, 1977, the default judgment, put Appellant on notice that there would be no evidence presented or received on the issue of conversion.

. . .

In this respect, it is Appellant's contention that his right to adequate notice of hearing was much greater in relation to the slight burden that would have been imposed on the proceeding had the trial court vacated its partial default judgment. At any rate, it is now pure error for the Supreme Court to assume that a constitutionally sufficient trial was in fact held. At the time of the hearing, the Appellant was justified in assuming that the default judgment prevented them from offering proof on the elements of conversion, other than legal title and value. In fact, the only notice which the Appellant had was to the effect that he would be barred from offering proof on certain elements of conversion. For the Supreme Court to approve the trial court's action solely on the basis that the Appellee did prove all of the elements of conversion anyway would be purely erroneous.

. . .

The sanction of judgment imposed by the trial court under the provisions of Rule 37 (d), of the Wyoming Rules Code of Procedure, under the circumstances,

prevented Appellant from properly presenting his case, from having a fair trial and denied him due process of law. For these reasons the Court should grant the Appellant's Petition for Rehearing.

The Wyoming Supreme Court summarily denied Appellant's Petition for Rehearing by an order dated August 28, 1978, a copy of which is attached hereto as Appendix B. It is from this order that this appeal is brought to invoke the United States Supreme Court's jurisdiction over the federal question presented.

FEDERAL QUESTIONS ARE SUBSTANTIAL

The Appellant must always shoulder the burden of affirmatively establishing the jurisdiction of the United States Supreme Court. *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 86 L. Ed. 1090, 62 S. Ct. 857 (1942). Consistent with its policy against premature constitutional adjudication, any doubts against carrying that burden will be resolved against jurisdiction. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 345, 348, 80 L. Ed. 688, 707, 709, 56 S. Ct. 466 (1936). (Dissenting opinion of Mr. Justice Brandeis.) With these touchstone precepts in mind, the discussion will now turn to the case law which directly, by analogy, or as distinguished, supports the invocation of this Court's jurisdiction in Appellant's appeal.

The criteria for invoking this Court's appellate jurisdiction is set forth in *Southwestern Bell Teleph. Co. v. Oklahoma*, 303 U.S. 206, 212, 82 L. Ed. 751, 755, 58 S. Ct. 528 (1938). There, the Court said:

"We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it." (Citations omitted.)

In addition to the three criteria mentioned above, the Appellant must also contend with the rule that where a state court judgment rests upon two grounds, one federal and one state, and where the state ground is independent of the federal and adequate to support the judgment, the Supreme Court will not assume jurisdiction. *See, e.g., Williams v. Kaiser*, 323 U.S. 471, 89 L. Ed. 398, 65 S. Ct. 363 (1945). These guidelines will serve as the framework for discussing the case law which supports the position that Appellant here is entitled to invoke the appellate jurisdiction of this court.

The Federal Question Was Presented For Decision to the Highest Court of the State

Ordinarily, a federal question must first be raised in the Wyoming District Court before it can be certified to and decided by the Wyoming Supreme Court. W.S. Section 1-13-101 (1977); *School District Number 14, Fremont County v. School District Number 21, Fremont County*, 48 Wyo. 511, 49 P.2d 682 (1935). The Appellant maintains that the above mentioned Wyoming authority has no application to his situation where the federal question did not come into existence until the Wyoming Supreme Court

affirmed the district court on the sole basis that the Appellee proved all essential elements of conversion under Wyoming law. This decision then brought into question the constitutional infirmity of the default statute as applied to Appellant because of the manner in which he was deprived of proper notice of the issues to be determined in the trial court.

After the Wyoming Supreme Court's decision brought to the fore the existence of a federal question, it is Appellant's position that the question was presented to that court in his Petition for Rehearing and Brief in Support thereof. This was the first occasion that Appellant had to raise the question and present it for the court's decision. There may possibly be dispute as to whether Appellant's Petition for Rehearing and accompanying Brief raised the question of whether the Wyoming default statute, as applied, deprived the Appellant of procedural due process because of faulty notice. That issue is one which only the Supreme Court of the United States can determine. In *Staub v. Baxley*, 355 U. S. 313, 318, 2 L. Ed. 2d 302, 309, 78 S. Ct. 277 (1958), this court said:

"Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of Federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court." (Citations omitted.)

Appellant submits that his Petition for Rehearing, and Brief in Support thereof, when read in conjunction, were sufficient to present to the Wyoming Court the fed-

eral question pertaining to the constitutionality of the default statute as it was applied to Appellant's case. A reading of Justice Thomas's concurring opinion indicates that the Wyoming Court either was or should have been aware of the consequences of their decision overruling Appellant's Petition for Rehearing, at least to the extent that their decision implicitly held the application of the default statute to be constitutionally correct. In regard to the sufficiency of the wording of Appellant's Petition for Rehearing and accompanying Brief, this court should consider the following language from *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 66, 73 L. Ed. 184, 187, 49 S. Ct. 61, 63 (1928):

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the State Court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intentment that this was done, the claim is to be regarded as having been adequately presented." (Citations omitted.)

**That the Federal Question Was Actually Decided or
That the Judgment as Rendered Could Not
Have Been Given Without Deciding It**

At first glance, there would appear to be a similarity between Appellant's case, where the order of the Wyoming Supreme Court denying the Petition for Rehearing appears to offer no grounds of decision, and those cases where the highest court of the state offered no opinion

whatsoever. See, *Hammerstein v. Superior Court of Cal.*, 304 U. S. 622, 95 L. Ed. 586 (1951); and *Dixon v. Duffy*, 344 U. S. 143, 97 L. Ed. 153, 73 S. Ct. 193 (1952). In those cases, this Court has either continued the cause so that the appellant there could petition the state court for a determination of the grounds of its decision (*Hammerstein v. Superior Court of Cal.*, *supra*) or vacated the state court's judgment where it was disinclined to offer a basis of its judgment (*Dixon v. Duffy*, *supra*). Appellant submits that its jurisdictional circumstance can be distinguished and that there were identifiable federal grounds upon which the Wyoming Supreme Court's decision was based.

By summarily denying Appellant's Petition for Rehearing, the Wyoming court has refused to reconsider the stance it took in its original opinion issued July 25th, 1978. It must therefore be concluded that its decision of the federal question presented in the Petition for Rehearing is to be extracted and understood only by reference to the court's original opinion. The sole basis of the court's original opinion is that the Appellees did prove all elements of conversion. However, that grounds of decision is in reality a federal one. The message it conveys is that Appellant was not deprived of procedural due process by operation of a default statute that notified him that proof of certain elements of conversion would be foreclosed at a trial, the decision at which is subsequently affirmed on the sole basis that the Appellees did prove all elements of conversion. The grounds of decision given by the Wyoming Supreme Court, in Appellant's opinion, both raise the federal question and answer it in the same instance. The judgment rendered by that court

could not have been given without deciding that the Wyoming default statute, as applied, did not deprive the appellant of procedural due process.

The State Court's Decision of the Federal Question Was Necessary to the Determination of the Case

The United States Supreme Court has faced numerous situations where the grounds of decision upon which a state court judgment seemingly rested were completely ambiguous. One of those cases was *Minnesota v. National Tea Co.*, 309 U. S. 551, 84 L. Ed. 920, 60 S. Ct. 676 (1940). There, it appeared to the court that the Minnesota Supreme Court's decision was based on either the Fourteenth Amendment to the Federal Constitution or Article IX, Section 1, of the Minnesota State Constitution, or both. The court found that there was:

"... sufficient reason for us to decline at this time to review the federal question asserted to be present, (citations omitted), consistently with the policy of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case. *Minnesota v. National Tea Co.*, 309 U. S. at 355, 84 L. Ed. at 923, 60 S. Ct. 676 (1940)."

Appellant submits that the preceding case can be distinguished from Appellant's predicament because the Wyoming Supreme Court has ruled, if not in explicit terms then at least in practical effect, that the Wyoming default statute, as applied, did not deprive Appellant of procedural due process. The Wyoming Supreme Court could not have found for the Appellees on the sole basis that it did without deciding the federal question. A ruling on that federal question was clearly necessary to the Wyoming Supreme Court's decision.

A similar jurisdictional problem brought about by an ambiguous state court decision was presented to this Court in *Herb v. Pitcairn*, 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459 (1945). That court noted that:

"In the course of its opinion, the Illinois Supreme Court used language from which it seems reasonably clear that the question [federal] was decided, either necessarily, because the court had not disposed of the case on state law grounds, or hypothetically." *Herb v. Pitcairn*, 324 U. S. at 124, 125, 89 L. Ed. at 793, 794, 65 S. Ct. 459 (1945).

Even though the court in that case was reluctant to say which ground (state or federal) the lower court's decision was based on, it did recognize that a federal question could be decided necessarily where a lower court opinion did not rest on adequate state grounds. Appellant submits that the grounds for the Wyoming Supreme Court's decision were not adequate because that basis of judgment in itself both raises and answers the federal question. Appellant would not recommend to this Court a course of action like that followed by the Court in *Herb v. Pitcairn*, *supra*. Appellant would instead suggest that the Court consider the advice contained in the dissenting opinion of Mr. Justice Black in the above cited case:

"I would not thus lightly abdicate our ultimate responsibility to protect federally created rights. To 'admit that the authority to review the action of a state court where it has decided a Federal question can be rendered unavailing by a suggestion 'that the court below may have' rested its judgment on a non-Federal ground, would simply amount to depriving this Court of all power to review federal questions if only a party chose to make such a suggestion.'" (Citations omitted.) *Herb v. Pitcairn*, 324 U. S. at 131, 89 L. Ed. at 797, 65 S. Ct. 459 (1945).

Appellant reiterates its position that the only real grounds of decision supporting the Wyoming Supreme Court's opinion is a federal one, and that it was exclusively necessary to the Court's conclusion.

The State Court's Decision Did Not Rest on Adequate and Independent State Grounds

In order to protect constitutional guarantees, the United States Supreme Court has a duty to determine whether asserted state grounds of decision adequately and independently support a state court's judgment. *Abie State Bank v. Brycn*, 282 U. S. 765, 773, 75 L. Ed. 690, 701, 51 S. Ct. 252 (1931). It is also well settled that where the non-federal grounds relied on by the state court are "... without any fair or substantial support ...", the Supreme Court's jurisdiction over the federal question may not be defeated. *Ward v. Love County*, 253 U. S. 17, 22, 64 L. Ed. 751, 758, 40 S. Ct. 419 (1920). Appellant contends that the state grounds of decision given by the Wyoming Supreme Court in its opinion are not independent of the federal question because those grounds are in effect the very root of the federal question. Since that court's grounds of decision both raise and answer the federal question, it must be concluded that those grounds are not adequate.

In dealing with the problems of overlap between federal questions and state questions, another helpful case is *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 89 L. Ed. 2092 (1945). In that case the issue was whether although the Nebraska Supreme Court clearly recognized that the power to vacate a license and to authorize its

transfer lied exclusively with the FCC, its decree was in effect inconsistent with that recognition. The Court held that the effect of the Nebraska Supreme Court judgment was to compel action in an area specifically reserved to federal authority. The Court's conclusion was that the Nebraska judgment therefore did not rest on an independent state ground because of the overlap between state and federal questions. Likewise, appellant submits that the Wyoming judgment does not rest on an independent and adequate state ground because the practical effect of the state court's decision is to deny a right to procedural due process which is specifically set up under the United States Constitution.

Appellant offers that *Staub v. Baxley*, 355 U. S. 313, 2 L. Ed. 2d 302, 78 S. Ct. 277 (1958), is also directly supportive of its position. In that case, the appellant had been convicted of violating a municipal ordinance dealing with the solicitation of membership for an organization or union. On appeal, the appellee contended that the state court's decision affirming the conviction and refusing to pass on the constitutional issue rested on adequate state grounds. The appellee asserted that it was unnecessary for the state court to reach the constitutional issue because:

(1) Appellant lacked standing to attack the constitutionality of the ordinance because she made no attempt to secure a permit under it.

(2) The appellant failed to attack "specific sections" of the ordinance and so under state procedure, it was unnecessary to pass on the constitutionality of the ordinance, and that this fact in itself constituted an adequate state ground so as to preclude review by the U. S. Supreme

Court. The Supreme Court held that the contention that the decision rested on adequate grounds was without any fair or substantial support. In reaching that conclusion, the Court was disposed to say that:

"It is therefore within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support . . . if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." (Citations omitted.) *Staub v. Baxley*, 355 U. S. at 319, 2 L. Ed. 2d at 309, 78 S. Ct. 277 (1958).

The opinion of appellant is that its situation closely parallels that in *Staub v. Baxley*, *supra*. The Wyoming Supreme Court has chosen to rest its decision of the federal question on its original opinion. That opinion and their decision rests upon state grounds which are plainly untenable and act as a mere subterfuge to their real basis of decision. The real basis of the Wyoming decision is that the Wyoming default statute, as applied, did not deprive appellant of procedural due process. Appellant contends of course, that the application of that statute did work a deprivation of procedural due process. Appellant further submits that the Wyoming Supreme Court's decision should be handled in a manner like the state court's decision was in *Williams v. Kaiser*, 323 U. S. 471, 89 L. Ed. 398, 65 S. Ct. 363 (1945), where this Court found that the state ground was not a substantial or sufficient one so that it was presumed that the state court based its judgment on the law raising the federal question which in turn enabled the Court to take jurisdiction.

CONCLUSION

Appellant submits that this appeal brings before the court substantial federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

GEORGE CLARKE
P. O. Box 7
Lusk, Wyoming 82225
Attorney for Appellant

APPENDIX A

IN THE SUPREME COURT,
STATE OF WYOMING

APRIL TERM, A. D. 1978

7-25-78

No. 4875

EVERETT SATTERFIELD,

*Appellant,
(Defendant below),*

vs.

SUNNY DAY RESOURCES, INC., a Corporation,
*Appellee
(Plaintiff below).*

Appeal from the District Court of Weston County,
The Honorable Paul T. Lamos, Jr., Judge.

George A. Clarke, Lusk, Wyoming, and Tedd C. Huston, Attorney at Law, Broken Bow, Nebraska, signed the brief, and Messrs. Clarke and Huston appeared in oral argument on behalf of the appellant.

Donald B. Hansen of Jones, Dumbrill & Hansen, Newcastle, Wyoming, signed the brief and Mr. Hansen appeared in oral argument on behalf of the appellee.

Before GUTHRIE, C. J., and McCLINTOCK, RAPER THOMAS and ROSE, JJ.

RAPER, J., delivered the opinion of the court, in which GUTHRIE, C. J., and McCLINTOCK and Rose, JJ., joined. THOMAS, J., filed a separate specially concurring opinion.

RAPER, Justice.

By this appellate proceeding, defendant-appellant challenges the judgment of the district court awarding to

App. 2

plaintiff-appellee a substantial money judgment (\$66,753.46) based on an alleged conversion by appellant of oil field equipment. In support of his position, appellant raises four issues which involve questions concerning:

1. Abuse of discretion by the district court in its order of partial default judgment;
2. Failure of proof of all necessary elements of conversion;
3. Valuation testimony accepted by the district court;
4. Property and/or security interest of appellant in property converted.

We shall affirm.

Our factual background by way of introduction need only be brief. On or about October 9, 1974, defendant sold to one C. B. Simmons various items of oil field equipment which, at that moment, were located at one Kennedy's storage yard in Newcastle, Wyoming. Before plaintiff could take any appropriate action, part of the stored equipment was removed from the yard at the direction of the purchaser. The equipment removed is the subject of this lawsuit and appeal. Other facts will be set out as required.

On July 7, 1976, plaintiff filed notice for the taking of defendant's deposition on August 2, 1976, the notice certifying that a true copy thereof had been mailed to defendant's attorney. On the date specified, neither defendant nor his attorney appeared. Pursuant to plaintiff's motion for default judgment as allowed by Rule 37 (d),

App. 3

W. R. C. P.,¹ the district court entered a partial default judgment in favor of plaintiff limited to the issues of whether or not the defendant had unlawfully sold certain oil field equipment and converted the proceeds therefrom to his own use. The court at that time left to be resolved at trial the issues of legal title at the time of conversion, as well as market value. Here on appeal, defendant asserts entry of such partial judgment by default was clearly an abuse of discretion. While at first blush the imposed sanction may appear somewhat harsh, it becomes apparent that it was without practical effect since based on the evidence presented at what turned out to be a full trial, as we shall point out, all necessary elements of conversion were fully proven, including those elements purportedly resolved by the default judgment. The judgment of default thus being of no apparent prejudice to defendant, we decline to investigate the allegation of an abuse of discretion. A party seeking reversal must establish that an error was prejudicial. *Pure Gas and Chemical Company v. Cook*, Wyo. 1974, 526 P. 2d 986; *West's Wyo-*

1 Rule 37 (d), W. R. C. P., provides in pertinent part:

"If a party * * * fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, * * * the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. * * *

Rule 37 (b) (2) (C) provides in pertinent part:

"An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;" (Emphasis added.)

ming Digest Appeal and Error, Key No. 1026. Some of the evidence was disputed. The standing appellate rule of which we frequently remind counsel prevails: We examine the trial evidence in the light most favorable to the appealing party and resolve all conflicts in his favor. *Gray v. Fitzhugh*, Wyo. 1978, 576 P. 2d 88; West's Wyoming Digest Appeal and Error, Key. Nos. 931 (1) and 989.

Conversion is defined as any distinct act of dominion wrongfully executed over one's property in denial of his right or inconsistent therewith. *Western National Bank of Casper v. Harrison*, Wyo. 1978, 577 P. 2d 635, 640. In order to recover damages in an action for conversion, a plaintiff's proof must show that:

- (a) the plaintiff has a legal title;
- (b) actual possession or the right to immediate possession at the time of conversion;
- (c) defendant dealt with the property in some wrongful manner within the definition of conversion first stated;
- (d) in cases where the defendant lawfully or without fault has come into possession of the property, then, with some exceptions, plaintiff must show that a demand has been made by plaintiff and that defendant has refused to return the property;
- (e) value of property converted.

De Clark v. Bell, 1901, 10 Wyo. 1, 65 P. 852, 853. See as well, *First National Bank of Highland v. Merchant's Mut. Ins. Co.*, 1977, 89 Misc. 2d 771, 392 N. Y. S. 2d 836; *Yoder Feed Service v. Allied Pullets, Inc.*, Ind. 1977, 359 N. E. 2d 602; *Staub v. Staub*, 1977, 37 Md. App. 141, 376 A. 2d 1129. We shall deal with each element individually.

Legal Title. Of the numerous items of equipment involved herein, only one, a Parkersburg pumping unit with Fairbank-Morse engine attached, was individually identifiable by a serial number or other distinctive marking, the remaining items, including tubing, casing, and rods and fittings, being of a general non-distinctive nature. We, nevertheless, find as did the district court, that based upon the testimony of plaintiff's office manager, as well as the chain of title established through various receipts and transfer orders entered as exhibits, legal title to all equipment sold and converted by defendant has been fully traced to and proved to rest in plaintiff. Plaintiff, through this evidence presented, accounted fully for the ownership of all equipment involved from the date of its purchase or receipt until its ultimate sale and conversion by defendant in October, 1974. In light of this evidence, it is clear that the first element of conversion, proof of legal title, has been properly met.

Actual Possession or Right to Immediate Possession. As specified in *De Clark* and reiterated in *Champion Ventures, Inc. v. Dunn*, Wyo. 1977, 567 P. 2d 724, another case out of this court concerning the alleged conversion of oil well equipment, the plaintiff in a conversion action must prove actual possession, or at a minimum, a right to immediate possession at the time the conversion occurred. While it might well be argued that based upon its legal title plaintiff had constructive "actual" possession, *Hardison v. Jordan*, 1945, 93 Me. 245, 44 A. 2d 892, what is more clearly apparent is that because of its legal title and the absence of any contrary outstanding arrangement, plaintiff had the sole right to immediate possession and could have exercised that right by merely paying whatever

App. 6

storage charges might have been due to Kennedy for use of storage space and removing the equipment. Under these circumstances, it is clear that the possession element of an action for conversion has been adequately shown.

Wrongful Act of Dominion. Without question it should be clear that defendant's sale to Mr. Simmons of the equipment involved, a sale which defendant does not deny, constituted a distinct act of dominion over appellee's property. The question is thus narrowed to whether or not such act was wrongful, i. e., in denial of or inconsistent with plaintiff's rights. We must agree with the district court that such was the case.

The major thrust of defendant's defense at trial urged that he, not the plaintiff, had a better right by title to the equipment involved. Contradicting such an assertion, in addition to the other evidence presented by plaintiff, was the testimony of plaintiff's accountant who testified that on approximately October 7th or 8th, prior to the sale in question, he had talked to defendant and specifically told him that the equipment in storage in Newcastle belonged to the plaintiff. While such a notice of ownership may have been necessary, even without it appellant's action could not be excused; for, in the civil action for conversion, "good faith on the part of the defendant or ignorance of the owner's rights does not avoid the consequences of (the) unauthorized act constituting conversion." *Seay v. Vialpando*, Wyo. 1977, 567 P.2d 285, 289. See as well, *Lindsey v. Security Savings Association*, Tex. Civ. App. 1977, 556 S. W. 2d 570, 571. Appellant's sale of the equipment in question thus constituted the physical act

App. 7

of conversion and an exercise of dominion over the property.

Demand and Refusal. Although as noted previously, *De Clark v. Bell*, supra, to establish conversion sometimes requires proof of a demand by the plaintiff and a refusal to return by the defendant, such proof, even when required, is not the sole alternative possible. *Arnold v. Prange*, Mo. App. 1976, 541 S. W. 2d 27, 30. Defendant never had actual possession, rightfully or wrongfully. Demand and refusal are merely evidential and need not be shown where another independent act of conversion is in evidence. *De Clark v. Bell*, supra; *City Loan Co. v. State Credit Association*, 1971, 5 Wash. App. 560, 490 P.2d 118. In the situation at bar, where defendant did not have possession of the converted equipment, a demand and refusal were not required, the need thereof being obviated by an independent specific act of conversion, i. e., the equipment's sale. Asportation by the defendant himself is not an essential element of conversion. *Western National Bank of Casper v. Harrison*, supra.

Value. Finally, with relation to the required element of value, both defendant and plaintiff offered testimony through their respective "expert" witnesses to establish the value at the time of conversion of each type of equipment involved. It is not defendant's contention that value has not been established but rather, as his claim reveals, the values found by the district court were incorrect.

Within this alleged error, defendant urges quite simply that the valuation testimony offered by his expert witness on value should have been accepted by the trial court rather than the testimony offered by plaintiff's expert. Defendant founds this assertion on what he be-

lieves were his expert's superior qualifications; yet as this court has noted before, the qualifications and knowledge of an expert are matters resting particularly within the discretion of the trial court whose determination is usually final and will not be disturbed except in extreme cases. *Matter of C. M.*, Wyo. 1976, 556 P.2d 514; *Runnion v. Kitts*, Wyo. 1975, 531 P.2d 1307. What defendant in actuality appears to be questioning is the trial court's choice of values between the conflicting ones presented. As we have said before, conflicts in evidence are for the trial court to resolve, and its determination will not be disturbed by this court when supported by substantial evidence. *Alexander v. Kadolph*, Wyo. 1977, 562 P.2d 313. See also, *Dickstein v. Williams*, Nev. 1977, 571 P.2d 1169. We find no abuse by the trial court in accepting the qualifications of plaintiff's expert witness.

Finally, defendant contends that because of an alleged property interest which he held in the oil field equipment in question, he should not have been found guilty of conversion. The three factors from which he alleges his property interest could be found to arise are: (1) alleged security interests in the equipment in question; (2) defendant's status as a corporate officer; (3) defendant's purchase at a prior sheriff's sale of oil field equipment. We, as did the trial court, can perceive no property interest in defendant.

Concerning the purported security interests, the evidence and exhibits present in the record on appeal clearly show that although defendant did at one time possibly hold two valid security instruments covering the equipment in question, both mortgages were released by him to plaintiff before the improper sale took place. Further,

although at the time of trial defendant had received by transfer from a third party a purported security interest in some of the equipment involved, acquisition of that alleged interest had occurred only five days previously and did not operate retroactively to invest any rights in defendant as of the date of conversion. As for the assertion that because of his position as president of plaintiff corporation he held an interest in the property in question sufficient to preclude his being guilty of conversion, defendant cites no authority in support thereof; thus we will presume none could be found. *Matter of Estate of Morgan*, Wyo. 1977, 568 P.2d 892, 896. Under such circumstances, where only a perfunctory argument without citation of authority is made in support of a contention, this court need not consider it. *Stephenson v. Mitchell, ex rel. Workmen's Compensation Department*, Wyo. 1977, 569 P.2d 95; *First National Bank of Thermopolis v. Bonham*, Wyo. 1977, 559 P.2d 42. We decline to do so here.

Finally, defendant maintains that on the basis of a sheriff's sale held in Niobrara County, Wyoming, in 1966, he rather than plaintiff, owned the equipment sold to Mr. Simmons. For support of this assertion, defendant submitted two exhibits, a sheriff's certificate of sale on foreclosure and an order confirming sale, yet neither document particularly specifies the equipment in question. If that equipment was covered, it would have to arise out of the words "improvements, machinery, equipment and materials * * *" found in the sheriff's sale documents; yet even when questioned by his own attorney, defendant could not connect to the trial court's satisfaction, the equipment purchased at the sheriff's sale in 1966 with that sold in 1974. On the basis of what the record reflects, we must agree with the judgment of the trial court.

Affirmed.

THOMAS, J., concurring.

I concur in the opinion of the Court with one exception. In Zweifel v. State ex rel. Brimmer, Wyo., 517 P. 2d 493 (1974) this Court said in connection with the entry of a default judgment for failure to answer interrogatories, at 517 P. 2d 498:

“ * * * Rule 37 (d), W. R. C. P., is explicit in permitting the entry of default judgment against one who fails to file answers to interrogatories or to excuse such failure. * * * ”

Rule 37 (d), W. R. C. P. is equally explicit with respect to the failure of a party to appear for the taking of his deposition. For me this would be a sufficient basis on which to dispose of the first issue raised by the appellant, although I question whether this issue was preserved in the record.

To the extent that the Court's opinion suggests that an abuse of discretion in granting a partial judgment as a sanction under these circumstances might be cured by trying the issues as to which the default judgment was entered without setting aside the default judgment or notifying counsel that the issues would be tried, I cannot agree that this is or should be the law. Such an approach well could be as prejudicial to a party as an abuse of discretion in granting the partial default judgment initially. In the absence of any reason to believe that the partial default judgment was not exactly what the trial court said it was, a party quite likely would be unprepared to try the issues as to which the partial default judgment had been entered. Trying the issues in such a case would compound, not cure, the prejudice.

APPENDIX B

IN THE SUPREME COURT, STATE OF WYOMING
APRIL TERM, A. D. 1978

No. 4875

EVERETT SATTERFIELD,
Appellant
(*Defendant below*),
vs.

SUNNY DAY RESOURCES, INC.,
a Corporation,
Appellee
(*Plaintiff below*).

O R D E R

Appellant having filed his Petition for Rehearing in the above-entitled case, and the court being fully advised in the premises and it appearing there is no reason to grant a rehearing herein,

IT IS ORDERED that said petition for rehearing be and the same is hereby denied.

Dated this 28th day of August, 1978.

By the Court:

/s/ Rodney M. Guthrie, Chief Justice

APR 17 1979

MICHAEL ROBAK, JR., CLERK

In The
Supreme Court of the United States

October Term, 1978

— o —
NO. 78-895
— o —

EVERETT SATTERFIELD,

Appellant,

vs.

SUNNY DAY RESOURCES, INC.,

Appellee.

— o —
**ON APPEAL FROM THE SUPREME COURT
OF WYOMING**
— o —

MOTION TO DISMISS
— o —

LELAND K. KOVARIK
Attorney at Law

Box 219
Gering, Nebraska 69341

Attorney for Appellee

TABLE OF CONTENTS

	Pages
Motion to Dismiss	1
Opinion Below	2
Statement of the Case	2
Argument	5
Conclusion	7

INDEX TO CITATIONS

CASES:

Bailey v. Anderson, 66 S. Ct. 66, 326 U. S. 203, 90 L. Ed. 3 (1945)	5
Boyer v. Bugher, 19 Wyo. 463, 120 P. 171 (1912)	6
Brown v. Massachusetts, 12 S. Ct. 757, 144 U. S. 573, 36 L. Ed. 546 (1892)	7
Charleston Fed. Sav. & L. Assoc. v. Alderson, 65 S. Ct. 624, 324 U. S. 182, 89 L. Ed. 857 (1944)	5
Erie R. Co. v. Purdy, 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847 (1902)	7
Hanson v. Denckla, 78 S. Ct. 1228, 357 U. S. 235, 2 L. Ed. 2d 1283 (1958)	5
Hulbert v. Chicago, 26 S. Ct. 617, 202 U. S. 275, 50 L. Ed. 1026 (1906)	5
In re Shreve, 432 P. 2d 271 (Wyo. 1967)	6
Knudson v. Hilzer, 551 P. 2d 680 (Wyo. 1976)	6

INDEX TO CITATIONS—Continued

	Pages
Mutual Life Ins. Co. v. McGrew, 23 S. Ct. 375, 188 U. S. 291, 47 L. Ed. 480 (1903)	5
Radio Station WOW, Inc. v. Johnson, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092 (1945)	6
STATUTES:	
28 U. S. C. § 1257 (2)	6
Rule 37 (d), W. R. C. P.	3, 4
Rule 37 (b), W. R. C. P.	3, 4

In The
Supreme Court of the United States

October Term, 1978

—o—
NO. 78-895
—o—

EVERETT SATTERFIELD,

Appellant,

vs.

SUNNY DAY RESOURCES, INC.,

Appellee.

—o—
**ON APPEAL FROM THE SUPREME COURT
OF WYOMING**
—o—

MOTION TO DISMISS
—o—

MOTION TO DISMISS

Appellee in the above-entitled case moves to dismiss the appeal on the following grounds:

1. The federal question sought to be reviewed was not timely or properly raised, or expressly passed on by the Courts of Wyoming.

2. The appeal does not present a substantial Federal question; and further, this case is not one for appeal.

3. The judgment of the Supreme Court of the State of Wyoming rests on an adequate non-federal basis.

OPINION BELOW

The opinion of the Supreme Court of the State of Wyoming is reported in 581 P.2d 1386 (1978).

STATEMENT OF THE CASE

On March 9, 1976, Plaintiff and Appellee Sunny Day Resources, Inc., hereinafter referred to as Appellee, filed its Complaint in the District Court of the Sixth Judicial District within and for the County of Weston, State of Wyoming, alleging that Everett Satterfield, Defendant and Appellant, hereinafter referred to as Appellant, did convert to his own use certain personal property owned by Appellee. An Answer was filed on behalf of Appellant on May 3, 1976, generally denying the allegations contained in Appellee's Complaint.

Thereafter, on July 7, 1976, a notice of taking Appellant's deposition was served on Appellant's attorney of record. Neither Appellant nor his attorney appeared at the time scheduled for the deposition or entered an objection to the taking of the deposition.

At the request of Appellee, the trial court on September 8, 1976, pursuant to Rule 37 (d), W. R. C. P. and Rule 37 (b) (2) (c), W. R. C. P., entered a partial default judgment against Appellant, stating that:

A judgment by default is awarded the plaintiff on the issue of whether or not the defendant unlawfully sold . . . (certain personal property) . . . and converted the proceeds of this sale to his own personal use. The plaintiff will still be required to prove that it was the owner of the above described property at the time of conversion by the defendant, and the market value of the above described property at the time of conversion.

Appellant on May 31, 1977, filed a second Answer admitting the sale of the property. Trial was had on June 6, 1977, which trial resulted in a judgment against Appellant. During this trial, Appellant did not raise any Federal Constitutional questions nor enter any objections, based upon Federal Constitutional rights to evidence received pertaining to any of the elements of conversion, whether or not these elements may yet have been at issue.

Appeal was taken from the judgment of the Trial Court to the Wyoming Supreme Court. The issues raised by Appellant and as stated by the Wyoming Supreme Court are as follows:

1. Abuse of discretion by the District Court in its Order of Partial Default Judgment;
2. Failure of proof of all necessary elements of conversion;
3. Valuation testimony accepted by the District Court;

4. Property and/or security interest of Appellant in property converted.

Appellant did not raise any Federal Constitutional questions on appeal. The validity of Rule 37 (d), W. R. C. P. and Rule 37 (b) (2) (c), W. R. C. P., collectively referred to as Wyoming default statute by Appellant, was not questioned by Appellant in any manner. Rather the thrust of his appeal was that the granting of the partial default judgment by the Trial Court was an abuse of discretion. The decision of the Trial Court was affirmed by the Wyoming Supreme Court in an opinion which did not discuss or pass upon any Federal Constitutional questions.

A Petition for Rehearing was filed by Appellant on August 25, 1978, and in which he raised the following issues:

- I. The Appellant's property was taken from him without due process of law.
- II. The Trial Court permitted evidence to be presented by the Appellee regarding issues which had already been determined by the Trial Court (see Order of Court dated September 8, 1976), which was prejudicial to Appellant's rights and prevented him from having a fair trial.

These general averments are the first instance in which Appellant attempted to raise any Federal Constitutional questions. They do not expressly raise the issue of the validity of the Wyoming default statute, but instead raise the issue of the fairness of trial due to improper notice as to the questions to be litigated. The Petition for

Rehearing was denied by the Wyoming Supreme Court without opinion.

ARGUMENT

1. The federal question sought to be reviewed was not timely or properly raised, or expressly passed on by the courts of Wyoming.

Prior to the Petition for Rehearing filed after the decision of the Wyoming Supreme Court, Appellant did not raise any Federal Constitutional questions. The validity of the Wyoming default statute was never challenged. The Supreme Court of the United States has consistently ruled that in order for its jurisdiction to be invoked on appeal from state courts, it must appear that the Federal questions involved were raised in the state courts at the proper time. *Mutual Life Ins. Co. v. McGrew*, 23 S. Ct. 375, 188 U. S. 291, 47 L. Ed. 480 (1903); *Charleston Fed. Sav. & L. Assoc. v. Alderson*, 65 S. Ct. 624, 324 U. S. 182, 89 L. Ed. 857 (1944); *Hulbert v. Chicago*, 26 S. Ct. 617, 202 U. S. 275, 50 L. Ed. 1026 (1906).

The attempt by Appellant to raise Federal questions for the first time in his Petition for Rehearing after the decision was entered by the Wyoming Supreme Court was improper. *Hanson v. Denckla*, 78 S. Ct. 1228, 357 U. S. 235, 2 L. Ed. 2d 1283 (1958); *Radio Station WOW, Inc. v. Johnson*, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092 (1945). Emphasis must be given to the fact that the Petition for Rehearing was denied without opinion. cf. *Bailey v. Anderson*, 66 S. Ct. 66, 326 U. S. 203, 90 L. Ed.

3 (1945), rehearing denied 66 S. Ct. 228, 326 U. S. 691, 90 L. Ed. 407.

The Federal question which Appellant is attempting to raise pertains to the propriety of the trial had in the state court. We submit the proper time to raise this question was at the trial.

Wyoming law states that constitutional questions not raised in the trial court will not be considered on appeal. *In re Shreve*, 432 P. 2d 271 (Wyo. 1967); *Knudson v. Hilzer*, 551 P. 2d 680 (Wyo. 1976). This state procedural requirement applies equally to non-constitutional issues, such as reviewing the admission of evidence where no objection is made in the trial court. See, *Boyer v. Bugher*, 19 Wyo. 463, 120 P. 171 (1912).

2. The appeal does not present a substantial federal question; and further, this case is not one for appeal.

The Appellant has attempted to phrase the Federal question which he seeks to raise in terms of the constitutionality of the Wyoming default statute as applied to this case. However, a careful consideration of this case should suggest that the only issue which is involved concerns the propriety of the conduct of the trial court in receiving evidence on and litigating questions which may not have been at issue. Conduct which was not compelled or even suggested by the Wyoming default statute. Rephrasing the issue sought to be raised so that it concerns only the conduct of the trial by the trial court makes it apparent that no substantial Federal question is presented and that this case is not one for appeal under United States Code Title 28, Section 1257 (2).

3. The judgment of the Supreme Court of Wyoming rests on an adequate non-federal basis.

As previously explained, Appellant did not question the trial had in this case on Federal Constitutional grounds until he filed his Petition for Rehearing. This does not comply with the procedural requirements established by the Wyoming Supreme Court. The decision of the Wyoming Supreme Court in denying Appellant's Petition for Rehearing clearly rests on an adequate non-federal basis. Review by the United States Supreme Court is, therefore, precluded. *Brown v. Massachusetts*, 12 S. Ct. 757, 144 U. S. 573, 36 L. Ed. 546 (1892); *Erie R. Co. v. Purdy*, 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847 (1902).

— o —

CONCLUSION

For all of the foregoing reasons, Appellee moves that this appeal be dismissed.

Respectfully submitted,

LELAND K. KOVARIK
Attorney at Law

Box 219
Gering, Nebraska 69341

Attorney for Appellee